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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 723

INTER-CITY TRANSPORTATION CO. INC.,

Petitioner,

against

HENRY A. BARNES, as Commissioner of Traffic of the City of New York,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF WRIT OF CERTIORARI

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I

As to Jurisdiction

The jurisdiction of this Court was not defeated by petitioner's choice between two equally available methods of presenting this cause in the New York Court of Appeals.

Upon the affirmance herein by the Appellate Division of the New York Supreme Court, petitioner had available alternative means of approach to the New York Court of Appeals, *viz.* by motion for leave to appeal, and by appeal taken as of right. Petitioner chose the former, because an appeal by permission is *plenary*: it brings up all

questions arguable upon the record; and the present record made available for reversal non-constitutional questions which a court will consider before reaching constitutional questions (*e. g.*, the unreasonableness of respondent's prohibitory order, particularly as that order needlessly entailed the total extinction of petitioner's business [fols. 136, 166-169; 30-32, 47-49] and the scope of the public easement of the highway in relation to omnibuses, etc.). Petitioner was not required to abandon such questions in order to have access to the Court of Appeals: a reversal there could have occurred on such questions without approach to any matters of constitutional law, state or federal.

On the other hand, the appeal as of right after such an affirmance as here occurred is a limited appeal, confining the jurisdiction of the Court of Appeals to constitutional questions "directly involved". New York Civil Practice Act, Sec. 588, sub. 1(a), so provided; the same provision continues in New York Civil Practice Law and Rules, Sec. 5601(1).

What "directly involved" means in this relation appears thus in Cohen & Karger, Powers of the New York Court of Appeals (Rev. ed. 1952), page 256:

> "Another feature which subdivisions (1) and (4) of section 588 possess in common is that they do not authorize appeal as of right unless the asserted constitutional question was decisive of the determination appealed from. It is not enough, for the purposes of these provisions, that a constitutional question is involved merely in the sense that it *might* have been passed upon below; or even that it *was* passed upon if it constituted only one of the alternative grounds of decision. It must clearly appear that the courts below took a view of the case which required them necessarily to pass upon the constitutional question in order to make their decision."

It was in August 1963, that petitioner had to choose the mode of approach to the Court of Appeals. There was then no way of knowing what supported the Appellate Division affirmance; no opinion was uttered. The Special Term opinion was equivocal. Handicapped by this state of affairs, petitioner was obliged to make its embarrassed application to Mr. Justice Harlan.

It was not until December 18, 1963 that the Appellate Division announced that, necessary to its decision herein, was the determination of stated federal constitutional (and statutory) questions. Had petitioner known in August what it thus learned in December, it would have made its election between the two available means of approaching the Court of Appeals more confidently: the choice, however, would have been the same.

Gorman v. *Washington University*, 316 U. S. 98, cited by respondent, is irrelevant: there the petitioner neglected to apply for the convening of the court (Supreme Court of Missouri sitting *en banc*) as the highest appellate court; *Gotthilf* v. *Sills*, —— U. S. ——, 84 Sup. Ct. 187, 11 L. ed. 2d 159, is likewise irrelevant: there, petitioner failed to use the only properly available approach to the New York Court of Appeals, after failing to secure the attention of that Court in two improper attempts. In the present instance the Court of Appeals, properly approached, declined to take jurisdiction. We believe that here, this Court, as in *American Ry. Express Co.* v. *Levee*, 263 U. S. 19, 21, would rely on the "ostensible character of declining jurisdiction" thus manifested, and regard the Appellate Division as the highest state court in which a decision could be had.

II

Respondent Concurs With Petitioner as to the Questions Involved Herein

(a)

Respondent's brief joins issue with petitioner as to whether petitioner's rights under the Motor Carrier Act as certificated by the Interstate Commerce Commission entail stoppage as well as transit of City streets, as to whether New York law can with constitutional effectiveness prohibit such stoppage, as to whether petitioner's short-haul commuter operations are properly classifiable for purposes of regulation with long-haul operations, as to whether an interstate carrier duly certificated can validly be required to have a state franchise as well.

(b)

Respondent wholly ignores the controlling authorities which petitioner adduces respecting these subjects.

CONCLUSION

The writ of certiorari should be granted.

Dated: New York, January 28, 1964.

Respectfully submitted,

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INDEX

	PAGE
I—As to Jurisdiction	1
II—Respondent Concurs With Petitioner as to the Questions Involved Herein	4
Conclusion	4